

FRAMEWORK OF THE LAW OF ARMED CONFLICT

I. OBJECTIVES

- A. Become familiar with the language and primary sources of the law of armed conflict.
- B. Understand how the law of armed conflict is triggered, and distinctions between Common Article 2 and Common Article 3.
- C. Become familiar with the 1977 Additional Protocols to the 1949 Geneva Conventions.

II. HAGUE TRADITION, GENEVA TRADITION, AND THE “INTERSECTION”

- A. Primary Sources of the law of armed conflict. While there are numerous law of armed conflict treaties in force today, most fall within two broad categories, commonly referred to as the “Hague Law” or “Hague Tradition” of regulating *means and methods* of warfare, and the “Geneva Law” or “Geneva Tradition” of *respecting and protecting victims* of warfare.
 - 1. The “Hague Tradition.” This prong of the law of armed conflict focuses on regulating **the means and methods of warfare** (e.g., tactics, weapons, and targeting decisions).
 - a. This method is exemplified by the Hague law, consisting of the various Hague Conventions of 1899, as revised in 1907,¹ plus the 1954 Hague Cultural Property Convention² and the 1980 Certain Conventional Weapons Convention.³
 - b. The rules relating to the means and methods of warfare are primarily derived from Articles 22 through 41 of the Regulations Respecting the Laws and Customs of War on Land annexed to Hague Convention IV. Article 22 states that the means of injuring the enemy are not unlimited.

¹ Convention IV Respecting the Law and Customs of War on Land and its Annex: Regulations Concerning the Law and Customs of War on Land. The Hague, October 18, 1907.

² Convention for the Protection of Cultural Property in the Event of Armed Conflict. The Hague, May 14, 1954.

³ Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects. Geneva, October 10, 1980.

- c. Treaties. The following treaties, limiting specific aspects of warfare, are also sources of targeting guidance. These treaties are discussed more fully in the Means and Methods of Warfare section on weapons.
 - i. Gas. The 1925 Geneva Protocol prohibits use in war of asphyxiating, poisonous, or other gases.⁴ A number of States, including the U.S., reserved the right to respond with chemical weapons to a chemical attack. The 1993 Chemical Weapons Convention, however, prohibits production, stockpiling, and use of chemical weapons, even in retaliation. The U.S. ratified the CWC in April 1997.
 - ii. Cultural Property. The 1954 Hague Cultural Property Convention seeks to protect cultural property.⁵
 - iii. Biological Weapons. The 1925 Geneva Protocol prohibits biological weapons. The 1972 Biological Weapons Convention prohibits their use in retaliation, as well as production, manufacture, and stockpiling.⁶
 - iv. Conventional Weapons. The 1980 Certain Conventional Weapons Convention (often referred to as the CCW) restricts or prohibits the use of certain weapons deemed to cause unnecessary suffering or to be indiscriminate: Protocol I - non-detectable fragments; Protocol II - mines, booby traps, and other devices; Protocol III - incendiaries; Protocol IV - laser weapons; and Protocol V - explosive remnants of war. The U.S. has ratified the Convention with certain reservations, declarations, and understandings.⁷
2. The “Geneva Tradition.” This prong of the law of armed conflict is focused on establishing non-derogable **protections for the “victims of war.”** In contrast to the Hague model of regulating specific weapons and their application, the Geneva Tradition confers the protections of the law of armed conflict primarily by assigning certain persons and places a legal status.
 - a. This method is exemplified by the four Geneva Conventions of 1949. While there were earlier Geneva Conventions (1864, 1906, and 1929), the

⁴ Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods or Warfare. Geneva, June 17, 1925.

⁵ Hague Cultural Property Convention, *supra* note 2.

⁶ Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction. London, Moscow, and Washington. April 10, 1972.

⁷ CCW, *supra* note 3.

current four treaties of 1949 are each devoted to protecting a specific category of war victims:

- i. GC I: Wounded and Sick in the Field.⁸
 - ii. GC II: Wounded, Sick, and Shipwrecked at Sea.⁹
 - iii. GC III: Prisoners of War.¹⁰
 - iv. GC IV: Civilians.¹¹
- b. The Geneva Conventions entered into force on October 21, 1950. The U.S. ratified the conventions on February 8, 1955. Currently, all existing States, with South Sudan's ratification actions on January 25, 2013, are parties to the 1949 Geneva Conventions.¹²
3. The "Intersection." In 1977, two treaties were drafted to supplement the 1949 Geneva Conventions: Additional Protocols I and II (AP I and AP II).
- a. The Protocols were motivated by the International Committee of the Red Cross's belief that the 1949 Geneva Conventions and the Hague Regulations insufficiently covered certain areas of warfare in the conflicts following World War II, specifically aerial bombardments, protection of civilians, and wars of national liberation.
 - b. Status. At the time of this writing, 173 States were parties to AP I and 167 States were parties to AP II. Unlike the Hague and Geneva Conventions, the U.S. has never ratified either of these Protocols. Significant portions, however, reflect customary international law. While there is no current authoritative list of the AP I articles the U.S. currently views as either customary international law, or specifically objects to, many consider remarks made in 1987 by Michael J. Matheson, then Deputy Legal Advisor at the Department of State, as the most

⁸ Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, August 12, 1949.

⁹ Convention II for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked members of Armed Forces at Sea. Geneva, August 12, 1949.

¹⁰ Convention III relative to the Treatment of Prisoners of War. Geneva, August 12, 1949.

¹¹ Convention IV relative to the Treatment of Civilian Persons in Time of War. Geneva, August 12, 1949.

¹² See http://www.icrc.org/eng/resources/documents/misc/party_main_treaties.htm for a listing of States party to the main treaties (last visited April 30, 2014).

comprehensive expression of the U.S. position.¹³ The U.S. has recently stated it considers almost all of AP II to reflect customary international law. In March 2011, President Obama announced his continued support of AP II and urged the Senate to act “as soon as practicable” on AP II. At that same time, President Obama announced that the United States would comply with a certain provision of AP I [Article 75 which provides fundamental guarantees for persons in the hands of opposing forces in an international armed conflict] “out of a sense of legal obligation.”¹⁴

- c. Although the U.S. has never ratified either AP I or AP II, their relevance continues to grow. These treaties bind virtually all our coalition partners.

B. Other sources for analyzing the law of armed conflict.

1. Treaty Commentaries. These are written works (also referred to as *travaux préparatoires*) by official recorders of the drafting conventions for the major law of armed conflict treaties (Jean Pictet for the 1949 Geneva Conventions and Yves Sandoz for the Additional Protocols). The commentaries provide critical explanations to many treaty provisions, and are therefore similar to legislative history in the domestic context. While a reading of the *travaux* is not always necessary where the plain meaning of the terms is evident from the text, they remain useful. Given the prevalence of terms of art in the law of armed conflict, a reading of the commentaries often illuminates the text of the treaty in question. Where the meaning of a provision contained in the treaty is unclear, the *travaux* can be decisive in resolving conflicts regarding the understanding of the parties at the time States party became signatories.
2. Military Publications. Military manuals are not sources of law in the context of creating law. Rather, such manuals are useful references in developing an understanding of the application of law of armed conflict concepts within the military generally and specific services in particular. However, recent studies have examined military manuals for evidence of *opinio juris* in seeking to resolve questions of whether State practice has ripened into binding customary

¹³ See Michael J. Matheson, *The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT’L L. & POL’Y 419, 420 (1987). This article is summarized in the Law of Armed Conflict Documentary Supplement. See also *Memorandum for Mr. John H. McNeil, 1977 Protocols Additional to the Geneva Conventions: Customary International Law Implications*, 9 May 1986, contained in the Law of Armed Conflict Documentary Supplement (summarizing DoD’s views on the customary international law status of AP I articles). Taken together, these two documents establish that as of 1987 the U.S. considered at least two-thirds of AP I’s provisions as CIL.

¹⁴ *Fact Sheet: New Actions on Guantánamo and Detainee Policy*, THE WHITE HOUSE, <http://www.whitehouse.gov/the-press-office/2011/03/07/fact-sheet-new-actions-guant-namo-and-detainee-policy> (last visited April 30, 2014) [hereinafter *Fact Sheet*].

international law.¹⁵ Because some of these publications are no longer available in printed form they have been compiled, along with many other key source documents, in the *Law of Armed Conflict Documentary Supplement*.

- a. FM 27-10, *The Law of Land Warfare*. Organized functionally by category, and incorporates rules from multiple sources including customary and treaty law. Note that FM 27-10 is dated July 1956, with Change 1 dated 15 July 1976. Note that a revision of the *Law Of Land Warfare*, to be called FM 6-27, is currently in the review process.
- b. DA Pam 27-1, *Treaties Governing Land Warfare*. A verbatim reprint of the Hague and Geneva Conventions.
- c. DA Pam 27-1-1, *Protocols to the Geneva Conventions of 12 August 1949*. A verbatim reprint of the 1977 Additional Protocols to the Geneva Conventions.
- d. NWP 1-14M/MCWP 5-12.1, *The Commander's Handbook on the Law of Naval Operations*. Chapters 5, 6, and 8-12 address specific aspects of the law of armed conflict. Other chapters of the publication are more broadly applicable to maritime operations and international law generally.

III. HOW THE LAW OF ARMED CONFLICT IS TRIGGERED

- A. The Barrier of Sovereignty. Among the most fundamental aspects of State sovereignty is freedom from external threats.
 1. That freedom is prominently displayed in the United Nations, the first purpose of which is maintenance of international peace and security.¹⁶ The UN Charter recognizes the sovereign equality of all member States,¹⁷ who in turn must resolve disputes in peaceful means and refrain from “the threat or use of force against the territorial integrity or political independence of any state.”¹⁸
 2. Normally, the concept of sovereignty protects a State from outside interference in its internal affairs. This is exemplified by the predominant role of domestic law in internal affairs. The law of armed conflict is a body of international law intended to regulate the conduct of State actors (typically combatants) during

¹⁵ See generally JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (2005).

¹⁶ U.N. Charter art. 1, para. 1.

¹⁷ *Id.* at art. 2, para. 1.

¹⁸ *Id.* at art. 2, para. 4.

periods of conflict. Whenever international law operates to regulate the conduct of a State, it must pierce the shield of sovereignty. The law of armed conflict is therefore applicable only after the requirements for piercing the shield of sovereignty have been satisfied.

3. Once triggered, the law of armed conflict intrudes upon the sovereignty of the regulated State by limiting the means and methods of its application of violence in combat and by imposing obligations to respect and protect certain persons and places.
 4. The extent of this intrusion depends on the nature of the conflict but may include restrictions on targeting, requirements for the treatment of POWs or detainees, and the imposition of criminal liability for failure to abide by the law.
- B. The Triggering Mechanism. The law of armed conflict includes standards for when it becomes applicable. This standard is reflected in the four Geneva Conventions.
1. **Common Article¹⁹ 2 – International Armed Conflict (IAC)**: “[T]he present Convention shall apply to all cases of declared war or of any other armed conflict which may arise **between two or more of the High Contracting Parties (i.e. states)**, even if the state of war is not recognized by one of them.”²⁰ Insofar as this is an article common to all four Conventions, its triggering indicates that all four Conventions are thereby applicable.
 - a. This is a true *de facto* standard. The subjective intent of the belligerents is irrelevant. The drafters deliberately avoided the legalistic term “war” in favor of the broader principle of armed conflict. According to the GC Commentary, this article was intended to be broadly defined in order to extend the reach of the Conventions to as many conflicts as possible.
 - b. The Commentary states “[a]ny difference arising between two States and leading to the intervention of armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war.”
 - c. Additional Protocol I. Supplements Common Article 2. Applies to International armed Conflicts.

¹⁹ “Common Article” is a critical term used in the law of armed conflict. It refers to the articles that are common to all four of the 1949 Geneva Conventions. Normally these relate to the scope of application and parties’ obligations under the treaties. Some of the Common Articles are identically numbered, while others are worded virtually the same but numbered differently in various Conventions. For example, the article dealing with special agreements is Article 6 of the first three Conventions, but Article 7 of the fourth Convention.

²⁰ See, e.g., GC I, *supra* note 8, art. 2.

- i. This controversial expansion of Common Article 2 expands the Geneva Conventions' application to conflicts previously considered non-international: "[A]rmed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self determination."²¹
 - ii. The United States has not previously ratified this treaty largely because of objections to the expansion of application noted above.
 - d. Termination of Application. The status of a conflict as an international armed conflict within the meaning of Common Article 2 terminates on the later of:
 - i. Final repatriation (GC I, art. 5; GC III, art. 5).
 - ii. General close of military operations (GC IV, art. 6).
 - iii. Occupation (GC IV, art. 6). In cases of occupation, GC IV applies for one year after the general close of military operations. In situations where the occupying power still exercises governmental functions, however, that power is bound to apply certain key provisions of GC IV for the duration of the occupation.
2. **Common Article 3 – Non-International Armed Conflict (NIAC):** "Armed conflict not of an international character occurring in the territory of one of the High Contracting Parties"²²
- a. These types of conflicts make up the vast bulk of ongoing conflicts. Whereas the existence of an international armed conflict triggers the entire body of the law of armed conflict, the existence of a non-international armed conflict (NIAC) only triggers application of Common Article 3's "mini convention" protections (and, in the case of States party, the protections contained in Additional Protocol II).
 - b. Regulation of these types of conflict necessarily involves the interjection of international regulation into a purely internal conflict - a much more

²¹ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I). Geneva, June 18, 1977, art. 1(4).

²² See, e.g. GC I, *supra* note 8, art. 3. In *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), the U.S. Supreme Court held that the "term 'conflict not of an international character' is used here in contradistinction to a conflict between nations." **Thus, every armed conflict must either be an international armed conflict OR a non-international armed conflict.** *Hamdan* is significant because the Court recognized that a Common Article 3 conflict can expand beyond the territory of one particular state.

substantial impairment of both territorial sovereignty and sovereign independence. As such, Common Article 3 was considered a monumental achievement for international law in 1949. But, the internal nature of these conflicts explains the limited scope of international regulation.

- i. Domestic law still applies. Unlike combatants during international armed conflict, guerrillas do not receive combatant immunity for their war-like acts. They may be punished by the sovereign as any other criminal.
 - ii. Lack of effect on legal status of the parties. This is an essential clause, without which there would be no provisions applicable to non-international armed conflicts within the Conventions. Despite the clear language of the last paragraph of Common Article 3 (“The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.”), States have been reluctant to apply Common Article 3 protections explicitly for fear of conferring a degree of international legitimacy on rebels.
- c. What is non-international armed conflict? Not all internal conflicts rise to the level of non-international armed conflict within the meaning of Common Article 3. Some conflict is more like isolated acts of violence, riots, or banditry. Although no set of criteria is listed in the Convention itself for determining the existence of a non-international armed conflict, the Commentary offers non-binding criteria to guide observers in determining whether any particular situation rises to the level of armed conflict.²³
- i. Does the group have an organized military force?
 - ii. Are members of the group subject to some authority?
 - iii. Does the group control some territory?

²³ COMMENTARY: I GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD (Jean S. Pictet ed. 1952). An alternate view to determine when a non-international armed conflict arises was offered in the *Prosecutor v. Tadic*’ decision. There, in the view of the International Criminal Tribunal for the Former Yugoslavia, the Appeals Chamber gave two criteria to determine the existence of a non-international armed conflict: 1) the intensity of the conflict; and 2) the organization of the parties to the conflict. See ICTY, *Prosecutor v. Tadic*’, Case No. IT-94-1-T, Opinion and Judgment (Trial Chamber II), 7 May 1997, para. 562. The Rome Statute (establishing the International Criminal Court), adopted on July 17, 1998, defines non-international armed conflicts as “armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.” See Rome Statute of the International Criminal Court, art. 8, July 17, 1998, 2187 U.N.T.S. 90.

- iv. Does the group demonstrate respect for the law of armed conflict? This is more often accepted to mean that the group must not demonstrate an unwillingness to abide by the law of armed conflict.
 - v. Does the government respond to the group with regular armed forces?
- d. Additional Protocol II. Supplements Common Article 3.
- i. Controversial changing coverage of law relating to non-international armed conflict. Intended to supplement the substantive provisions of Common Article 3, AP II formalized the criteria for the application of that Convention to a non-international armed conflict, requiring both more formalized command structures *and* some control over specific territory.²⁴ According to AP II, art. 1, “dissident armed forces or other organized armed groups” must:
 - A. Be under responsible command.
 - B. Exercise control over a part of a State so as to enable them to carry out sustained and concerted military operations and to implement the requirements of AP II.
- C. How do the Protocols fit in?
- 1. As indicated, the 1977 Additional Protocols to the 1949 Geneva Conventions are supplementary treaties. AP I is intended to supplement the law of armed conflict related to international armed conflict (Common Article 2 conflicts), while AP II is intended to supplement the law of armed conflict related to non-international armed conflict (Common Article 3 conflicts). Therefore:
 - a. When you think of the law related to international armed conflict, also think of AP I; and
 - b. When you think of the law related to non-international armed conflict, also think of AP II.

²⁴ According to the January 1987 letters of transmittal and submittal to the Senate from President Ronald Reagan and his Secretary of State George Schultz, the Administration’s main objection to AP II was that it did not apply to all NIACs, and only applied once a dissident armed group controlled enough territory to conduct sustained operations. See MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING THE PROTOCOL II ADDITIONAL TO THE GENEVA CONVENTIONS OF AUGUST 12, 1949, AND RELATING TO THE PROTECTION OF VICTIMS OF NONINTERNATIONAL ARMED CONFLICTS, CONCLUDED AT GENEVA ON JUNE 10, 1977 (Jan. 29, 1987) .

- D. U.S. policy is to comply with the law of armed conflict during all operations, whether international armed conflict, non-international armed conflict, or situations short of armed conflict.
1. DoD Directive 2311.01E (Change 1, 2010), DoD Law of War Program, states that DoD policy requires all “[m]embers of the DoD Components comply with the law of war during all armed conflicts, however such conflicts are characterized, and in all other military operations.”²⁵
 2. The Chairman of the Joint Chiefs of Staff has issued further guidance on the matter. CJCSI 5810.01D (30 Apr 2010), which implements the DoD Law of War Program, similarly states that “[m]embers of the DOD Components comply with the law of war during all armed conflicts, however such conflicts are characterized, and in all other military operations.”²⁶

IV. LAW OF ARMED CONFLICT AND INTERNATIONAL HUMAN RIGHTS LAW

- A. What is the relationship between the law of armed conflict and international human rights law? International human rights law refers to a distinct body of international law, intended to primarily protect individuals from the arbitrary or cruel treatment by their own governments. While the substance of human rights protections may be synonymous with certain law of armed conflict protections, it is critical to remember these are two distinct bodies of international law. The law of armed conflict is triggered by conflict. No such trigger is required for international human rights law. These two bodies of international law are easily confused, especially because of the contemporary use of the term “international humanitarian law” in place of “law of war” or “law of armed conflict.” There is much current debate concerning the merging, or “complementarity” between the law of armed conflict and international human rights law. Further discussion of this issue is found in the Human Rights chapter, *infra*.

²⁵ DoD Directive 2311.01E (Change 1, 2010) supersedes the language in DoD Directive 5100.77 (Dec 9, 1998 – now canceled) that required members of the armed forces to “comply with the law of war during all armed conflicts, however such conflicts are characterized, and with the principles and spirit of the law of war during all other operations.” Note that DODD 2311.01E is currently in the process of review and an updated instruction will be available in the near future.

²⁶ Chairman of the Joint Chiefs of Staff Instruction 5810.01D, Implementation of the DoD Law of War Program (30 Apr 2010).